No. 290

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Supreme Court of the United States

OCTOBER TERM, 1958

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY OF AMERICA and THE EQUITY ANNUITY LIFE INSURANCE COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENTS.

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Statement of Interest.

The Mutual Life Insurance Company of New York and State Mutual Life Assurance Company of America, are mutual life insurance companies, each licensed by and doing business in all of the States and the District of Columbia. Their principal business for more than 100 years has been the issuance of life insurance and annuities.

The interest of these companies in this litigation is in having the issuance of variable annuities recognized as a proper insurance function so that such contracts, in both individual and group forms, may be developed within the same framework of State legislation and regulation as that applicable to all other life insurance contracts.

The Question Presented.

The question presented in this case is whether the sale to the public of variable annuity contracts—that is to say, contracts the reserves for which are supported by investments primarily in equities, with the amounts of the annuity payments varying with investment experience—are subject (a) to the Federal system of securities regulation, (b) to the State systems of life insurance regulation, or (c) to both systems. Petitioner, Securities and Exchange Commission, contends that they should be held subject to the Federal system or to dual regulation by both Federal and State systems.

Argument.

It is respectfully submitted that variable annuities are insurance contracts and that it is in the public interest that, to the extent that variable annuities are offered to the public, they be subject to the comprehensive systems of life insurance regulation provided by the States. It is further submitted that it was not the intent of Congress that dual systems of regulation should be applied.

There can be no question that the variable annuity has, for the reasons stated in respondents' briefs, the unique characteristics of certain life insurance contracts[1]—the liquidation through income payments of a principal sum, together with the investment earnings thereon, exactly over

[1] The variable annuity concept itself recognizes the important distinction that exists between those life insurance contracts which provide for periodic income payments over appreciable, and often very long, periods of time, and those which provide for indemnity. It is only with respect to the former that there is the new emphasis on equity investments.

the human life span, accomplished through the pooling of large numbers of mortality risks. The life insurance business is the only business which employs the highly specialized techniques, under experienced State life insurance regulation and supervision, and requiring trained actuarial knowledge and skills by means of which such contracts, on both an individual and a group basis, can properly be offered to the public.

It is significant that the linking of the annuity principle with equity investments was placed in viable form by Teachers Insurance and Annuity Association[1], the company providing the retirement plans for institutions of higher learning throughout the country. It is also significant that the special enabling legislation for CREF was adopted in as financially knowledgeable a state as New York, a State which has an outstanding record of leadership in life insurance legislation and regulation, and that it placed the operations of the new company under the supervision of the Superintendent of Insurance.

The variable annuity differs from the conventional annuity only in that a materially greater part of the investments supporting its reserves is in equities and annuity payments are contractually keyed to investment experience. This has made necessary the employment of a measure for the periodic payments of annuity income other than a fixed number of dollars, but the periodic income payments are still made through the use of a determinable measure.

The increased emphasis on equity investments is not novel to the life insurance business. Prior to 1950, personal

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[1] Through the formation of a companion company under common management, College Retirement Equities Fund ("CREF"). New York has not yet enacted legislation which would be required to enable domestic life insurance companies generally to issue variable annuities.

trusts limited to "legal" investments in New York were not permitted to make any equity investments. By statutory amendments in that year, up to 35% of such funds may now be invested in equities.[1] The steadily increasing utilization of equity investments in the past quarter century by college and university endowment funds is well known.[2] Funds of religious corporations may now be invested in equities.[3] There has been a significant use of equity investments in funds supporting pension plans which are not funded with life insurance companies.[4] The development in the 1920's and the subsequent rapid growth, particularly since 1940, of mutual investment funds are matters of common knowledge,[5] as is also the growth of the New York

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[1] Chapter 464, Laws of New York 1950, amending the Personal Property Law, Section 21, the Domestic Relations Law, §85, the Banking Law, §100-c, subd. 3, and repealing §111 of the Decedent Estate Law.

See also "A Report by the Trust Investment Study Committee" (New York State Bankers' Association), New York, 1949.

[2] Wood Struthers & Co., *Trusteeship of American Endowments*, 1932.

Scudder, Stevens & Clark, *Survey of University and College Endowment Funds* (1947), pp. 12-13, 19, 24.

"Investing Harvard Money", *Harvard Alumni Bulletin*, pp. 628-634, May 12, 1951.

Guthmann, Harry G., *Institutional Investment and the Problem of Equity Financing*, "Institutional Investments, Law and Contemporary Problems," Duke University, Winter 1952, p. 185.

Vance, Sanders & Company, *A Comprehensive Study of College and University Endowment Funds at June 30, 1957*, Boston Fund, 1957, p. 25.

The Putnam Management Company, *The Harvard Endowment Fund, Research Report*, The George Putnam Fund, Mass. Yearly.

[3] *e.g.*, New York Religious Corporations Law, Sec. 5-a, added by L. 1950, c. 225.

[4] Federal Reserve Bank of New York, *Monthly Review*, December 1953.

Howell, Paul L., *Common Stocks and Pension Fund Investing*, Harvard Business Review, November-December, 1958, pp. 92-106.

[5] National Association of Investment Companies, monthly releases.

Stock Exchange Monthly Investment Plans.[1] There have been changes in laws permitting, to a lesser degree, investments in equities by life insurance companies[2] and even savings banks.[3]

It is respectfully submitted that, as similar changes take place in relation to contracts providing installment income payments based on mortality risks, their essential character does not change. It is further submitted that it is in the public interest that they be offered by life insurance companies. Generally speaking, this would be likely to tend toward a conservative approach to investment questions. It would seem of equal importance, from the standpoint of the public interest, that such contracts be sold by life insurance men in combination with, and as a supplement to, other products of their companies. This would tend to avoid overselling of the equity idea.

Life insurance is a developing business. The payment of policy proceeds through optional annuity and other installment income plans, group insurance and group annuities[4], as well as various forms of business insurance,

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[1] "The Exchange" (New York Stock Exchange monthly publication).

[2] *e.g.*, New York Insurance Law, Sec. 81, subd. 13, added by L. 1951, c. 400, §5; amended by L. 1957, c. 646, §2.

[3] *e.g.*, New York Banking Law, Sec. 235, subd. 26, added by L. 1952, c. 705, §1. See also *Equity Investing by Mutual Savings Banks*, August Ihlefeld (President, Savings Banks Trust Company, New York, 1953).

[4] In the group annuity field, especially under deposit administration, there are many counterparts of the variable annuity in that the insurer may assume less than all the risks assumed under the conventional annuity. For example, there may be no guarantee, or only a limited guarantee, of the rates at which annuities are purchased on the lives of employees at their retirement. Or, some of the elements in the formula on which the rates at retirement are calculated may be specifically left open for adjustment according to the group's future experience, e.g., the insurer's administration expenses, or the insurer's investment experience during the accumulation period.

are only a few examples of such developments. In their initial stages, these were largely experimental, as variable annuity contracts are in their current stage. The others reached their present stage of service to the public under State insurance statutes and, of equal or possibly even greater importance, under the broad supervision of State regulatory authorities experienced in the basic concepts and techniques peculiar to the life insurance business.

Regulated experimentation within this framework is salutary, and the safeguards which it might be expected to supply should be a major factor in the development along sound lines of new or improved insurance functions such as the variable annuity.

Of significance also in this legislative and regulatory area is the role played by the States collectively. The emergence of sound patterns in the new fields has been accelerated by parallel development under generally similar but somewhat differing State statutes and regulations. Thus, similarly regulated experimentation with variable annuities can be expected to cover such matters as the types of equities in which investments may be made, percentage limitations on investments in particular issues, percentage limitations on the amount of voting stock of a single company which an insurer may own, proportion of equity investments which may be held in the reserve, whether variable annuities may be sold alone or only in combination with conventional annuities, conditions of withdrawal during the accumulation period and similar matters.

Congress was aware of the development of the business of insurance in the past under these conditions. It seems clear from the language employed in the statutes under which the Federal system of securities regulation has been established, as well as the McCarran Act, that it was not

the intention of Congress that, as attempts are made to develop new or improved services through products possessing the unique characteristics of life insurance contracts, either the industry or those products should be subjected to dual systems of regulation, State and Federal. The reasons are elaborated in the briefs of respondents.

Conclusion.

It is respectfully urged that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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